CITY OF DALLAS

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William F. Caton
Office of the Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: In the Matter of 95-59 Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. DA 91-577; 45-DSS-MSC-93

Dear Mr. Caton:

Enclosed herewith please find an original and ten copies of City of Dallas' Comments to the Notice of Proposed Rulemaking in connection with the above-referenced matter. Please file stamp one copy and return it to me in the self-addressed stamped envelope also enclosed. Should you have any questions, I may be reached at (214) 670-3481.

Very truly yours,

JANIS EVERHART
Assistant City Attorney

Enclosure

No. of Copies rec'd 0+10

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SUMMARY

While recognizing the need for certain modifications to the current Federal Communications Commission ("the Commission") rule in light of Town of Deerfield, New York v. FCC, 992 F. 2d 420 (2d Cir. 1992) ("Deerfield"), the Local Communities assert that the Commission in its Notice of Proposed Rulemaking in the Matter of Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59 (released May 15, 1995) ("NPRM") goes far beyond what is necessary to accommodate any needed changes and proposes to substantially intrude in matters best left to local government control. Zoning, building, electrical and other land use and safety codes and regulations are the essence of community planning and the basic functions of local government - to protect the health, safety and welfare of its citizens. The threatened preemption is a broad, sweeping step with apparent disregard of the local values and conditions. Such a step overrides the principles of federalism to benefit the interests of the telecommunications industry.

The NPRM will lead to multiple complaints coming before the Commission. The Commission proposes to reverse the traditional legal deference in favor of validity of such local regulations. The

presumption against validity will encourage those who oppose local regulations to use the local process merely as a "rite of passage" to Commission review and will ensure that the regulations of smaller communities, which have limited resources to oppose the presumption, will be preempted. Even larger communities, which presumably have greater resources with which to defend such regulations, have other municipal needs to finance. It will also ensure that the Commission will indeed become a "national zoning board," as well as a national safety code expert. Further, the Commission will perform these functions without the traditional expertise necessary to weigh the competing interests, since the vast majority of local governments are distant and have little resources available for appearances at the Commission.

Local officials are interested in the development of interstate telecommunications. It would be foolhardy for local officials to ignore substantial number of citizens who want satellite broadcasting. With only anecdotal evidence from the telecommunication industry and with a limited solution to Deerfield possible, it is unnecessary for the Commission to expand the preemption rules.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.

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	)	45-DSS-MSC-93

COMMENTS OF THE CITIES OF DALLAS, TEXAS; DENTON, TEXAS; HOUSTON, TEXAS; AUSTIN, TEXAS; HILLSBORO, TEXAS; PLANO, TEXAS; CEDAR HILL, TEXAS; FORT WORTH, TEXAS; FARMERS BRANCH, TEXAS; WACO, TEXAS; GRAND PRAIRIE, TEXAS; RICHARDSON, TEXAS; GRAPEVINE, TEXAS; IRVING, TEXAS; AND GREENVILLE, TEXAS; THE NATIONAL LEAGUE OF CITIES; THE NATIONAL ASSOCIATION OF COUNTIES; AND THE UNITED STATES CONFERENCE OF MAYORS

The cities of: Dallas, Texas; Denton, Texas; Houston, Texas; Austin, Texas; Hillsboro, Texas; Plano, Texas; Cedar Hill, Texas; Fort Worth, Texas; Farmers Branch, Texas; Waco, Texas; Grand Prairie, Texas; Richardson, Texas; Grapevine, Texas; Irving, Texas; and Greenville, Texas; and the National League of Cities[1]; the National Association of Counties[2]; and the United States Conference of

[1] The National League of Cities represents more than 16,000 cities and towns nationwide.

[2] The National Association of Counties represents the approximately 2,000 counties across the nation.

Mayors[3]; (hereafter collectively referred to as "the Local Communities") file these comments in the above-captioned proceeding.

INTRODUCTION

The Federal Communications Commission ("the Commission") has requested comments on its proposed rulemaking in regard to modification of the rule preempting local regulation of satellite earth stations.[4] In its Notice of Proposed Rulemaking In the Matter of Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59 (released May 15, 1995) ("NPRM") the Commission recognized the conflict between the development of interstate telecommunications through satellite programming and the principles of federalism. The Commission proposes to balance "the federal interest in nationwide communications systems" against the "principles of federalism."[5] The Local Communities

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[3] The United States Conference of Mayors represents more than 950 cities with populations exceeding 30,00 residents.

[4] 47 C.F.R. § 25.104.

[5] NPRM ¶41.

believe the proposed modifications unfairly favors the interests of the telecommunications industry at the expense of federalism. The Local Communities urge the Commission to revise the proposed rule to reflect greater latitude for local regulations and preserve local land use control.

Zoning codes, building codes, and electric codes serve valuable public health, safety and welfare purposes. Zoning is designed to lessen congestion in the streets; secure safety from fire; provide adequate light and air; prevent overcrowding of land; avoid undue concentration of population; and facilitate adequate provision of transportation, water, sewers, and parks.[6] Building codes provide minimum standards to safeguard like, limb, health and property by regulating and controlling the design, construction, quality of materials, use, occupancy, location and maintenance of all structures.[7] Electric codes safeguard persons and property from hazards arising from the use of electricity.[8] Together, these codes and other safety codes strive to create an ideal urban environment

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[6] Texas Local Government Code §211.004.

[7] Uniform Building Code §102.

[8] National Electric Code §90-1.

by preventing injury and property damage, protecting property values, encouraging business development, and increasing the quality of life. Without zoning, building, electric and safety codes, disorder and danger would rule our cities.

DISCUSSION

I. Land use, building code, electrical code, and safety code decisions are best left at the local level.

A. Land use and zoning decisions are made by local authorities on a regular basis. Typically, the process begins with input received at meetings held in the local community. Public hearings are then held at which interested parties formally present their position. The decision making body then reaches a decision based on the competing interests, using its knowledge of local conditions. Appeal from zoning decisions is made administratively and to state court, which also have knowledge of local conditions. Under the current system, zoning and land use decisions are made by the officials with the greatest knowledge of local conditions, with input from many sides. The current regulations reflect local values and needs, striking a

balance between the interests of the satellite antenna owners and the community at large. Through the election process, local officials are held accountable to satellite antenna users, telecommunication companies operating in the local market and the community in general.

B. Building code, electrical code and safety codes are developed by persons with years of experience in relevant scientific disciplines and under recommendations from those with recognized expertise. These codes are developed by experts from the public and the private sectors. Over time these codes are amended to reflect changing conditions and technologies. While the codes attempt to accommodate public health and safety needs of the community, individual prerogatives and commercial goals, failure to require compliance with public health and safety regulations can result in a calamity. All businesses and property owners in the local community expect that the local government will protect their safety and welfare and therefore abide by the code's requirements. It is a unique and short-sighted industry which proposes to ignore regulations indisputably related to public health and safety.

Allowing the satellite industry to bypass health and safety regulations may threaten communities and their citizens.

C. We believe that the Commission is particularly ill-suited to review local decisions. First, the Commission's expertise is in telecommunications, not urban planning. The Commission has no knowledge of local conditions, values or needs. Second, the Commission can not expect to become an expert in building, safety or electrical codes. The Commission, in undertaking the burden of ruling on these codes, becomes the custodian of public safety and welfare, not a role the Commission was designed to perform. Third, the Commission is not prepared to take on the massive burden of reviewing every antenna-related decision made by every local government authority in every city, every county and every state in this country, which is adverse to an earth station owner or the satellite industry. The number of cases generated will be enormous, and will increase as satellite antennas become more commonly used and new technologies become more readily available. Finally, while local authorities are held locally accountable through appeal to state courts and the election process, the Commission does not have such accountability.

D. The Local Communities urge the Commission to very carefully consider its actions. Although the Commission has cast the issue as between the industry and local governments, the real participants in land use matters are the neighbors and neighborhoods. To the extent that local governments and their citizens are removed from the decision-making process or the Commission substitutes its judgments for those of local authorities, most local citizens aggrieved by the proposed satellite antenna owner action will, be shut out of the process. Since the Commission has made no provision for citizen participation or input, we do not believe that the Commission either desires or wants to resolve such local issues. Moreover, by virtue of the absence of a procedure for such input, the Commission has, in effect, already decided against federalism and in favor of the satellite industry.

II. There is no need for the proposed rule.

A. The factors cited by the Commission as prompting the new rules are not valid. The discussion contains a number of anecdotes submitted by industry groups to demonstrate that local regulations are overly burdensome. The Commission cites these anecdotes as

authority for the need to preempt local zoning authority[9]. The Local Communities suggest that the industry has magnified the problem in an effort to relieve themselves of legitimate local regulation. Nowhere in the discussion do we find any mention of an outright prohibition on satellite dishes. In reality, the burden to obtain approval of satellite antennas in most jurisdictions is minimal.

B. For instance, in Dallas approval of an antenna installation is largely a matter of right. The applicant files his application for a building permit, and if the antenna meets certain minimal requirements with respect to lot coverage, setback and height, then it is granted. Dallas is aware of no instance when such a request was denied, nor have any complaints been made that the minimal requirements hindered reception. As another example, an Olympia, Washington ordinance requiring property owners who could not obtain reception in the rear yard to apply for a variance was cited by an industry association as so burdensome that property owners will abandon their plans to install earth stations. (Footnote 28, Page 7 NPRM) The burden is stated to be the fee, plans, notification and hearing. This anecdote has been inflated. An application for a

[9] NPRM at ¶12-25

variance is usually not cumbersome. In most states, statutes or case law requires that any application fees reflect the cost of processing the application, and cannot be used to generate revenue. (See: City of Houston v. Harris County Outdoor Advertising, 879 S.W.2d 322 (Tex. App. - Houston [14th Dist.] 1994, writ denied). The requirement for plans is usually minimal; they often can be hand-drawn. The notification and hearing requirement poses no burden on the property owner because the local government sends the notice and holds the hearing. Thus, on the basis of overstated anecdotal evidence the Commission has proposed sweeping preemption.

C. While the record contains anecdotes submitted by those interested in eliminating all local requirements, we suggest that the Commission conduct its own study to determine whether a need exists for this proposed modification.

D. The other stated reason for the new modification is the decision in Town of Deerfield, New York v. FCC, 992 F. 2d 420 (2d Cir. 1992) ("Deerfield"). In that case, the court held that the Commission could not act as the appellate body to review decisions of state and federal courts. This holding necessitates revisions to allow for Commission review before appeal to the courts. The

holding does not, however, mandate that the Commission expand its existing preemption of local regulations.

III. The procedure under the proposed rule will be unduly predisposed against local governments.

A. The Local Communities fear that local governments, neighborhood groups and individual citizens will be unable to effectively participate in Commission proceedings, eliminating the responsiveness of the process to local values and needs. Given the Commission's emphasis on development of interstate telecommunications and satellite broadcasting and given the industry's accessibility to the Commission, we question whether local land use and safety regulations will be objectively evaluated on their merits. This possibility is evidenced by the Commission's proposal to shift the burden of persuasion to the local government.

B. Because of the more complex procedure and the distance between virtually all areas of the country and Washington, input from the local governments, neighborhood groups and individual citizens involved will be impeded. The Commission has recognized the difficulty in making rules for 10,000 different local

jurisdictions[10]. This difficulty is made even greater when most of the 10,000 local jurisdictions are unaware that their land use regulations and safety codes are subject to preemption by a federal agency. Not only are most local jurisdictions presently unaware of the NPRM, they will be unaware of any Commission decisions resulting from its application. Without knowledge of or access to the Commission, the result of the proposed modification will be a large number of waivers sought by those local governments which are sophisticated and financially able to respond. The second result will be that the land use and safety codes of unsophisticated and less financially able local governments will be preempted.

C. While the industry has actual notice of the NPRM and has attorneys who routinely practice before it, the Local Communities are far from Washington and often without resources to appear before the Commission. In this light, it is not surprising that industry groups support preemption. It is much easier for industry to appear before the Commission than before local governments. Removed from the local jurisdiction, unfamiliar with local concerns and conditions and unaccountable to the local citizen, the

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[10] NPRM at ¶77

Commission is a much more familiar and friendlier forum. Further, if a local government is financially unable to hire an attorney and produce the documentation and expertise to defend itself, the locality's health and safety codes will be preempted. Without a presumption in the favor of local governments, there is no way to guarantee that all issues are represented before the Commission in the appeal process.

D. We disagree strongly with the approach advocated by Hughes in ¶40 of the NPRM, which requires local governments to certify familiarity with Commission practice. That approach guarantees increased costs for the local government, probably through hiring attorneys who practice regularly before the Commission.

E. The proposed modification encourages industry to file objections to local regulations with the Commission. The minimal standards established as meeting the exhaustion of administrative remedies will encourage those satellite antenna owners who oppose the local ordinance to simply "coopt' the process. Such owners could extend the process beyond the ninety day threshold or inflate the costs of screening requirements. It will likely be routine to file an objection to the payment of any fee or any land use or safety

regulation. Further, the proposed procedure allows the industry to have several chances to win its case. If the industry is unsuccessful at the local level, all that is needed is to petition the Commission for a declaratory ruling. Once the petition is filed, the local government has the burden of defending its regulation. If unsuccessful before the Commission, industry will have recourse to the federal court in Washington D. C., again far away from the Local Communities. The additional review before the Commission will increase the cost to the local government and affected citizens and delay a final decision.

F. The availability of a waiver does not eliminate the predisposition against the local government. The cost of applying for a waiver in Washington against a well financed, sophisticated industry will be prohibitive. Very few of the 10,000 local governments can afford to hire counsel to make a presentation before the Commission. Furthermore, the Commission will need detailed drawings, maps and expert testimony to determine the validity of the locality's land use and safety regulations. Each of those requirements represents a significant cost to the locality.

G. The proposed modification opens local governments to spurious charges, and may result in consequences unintended by the Commission. For example, in Dallas, a property owner installed six satellite dishes on his property, even though the local ordinance limits accessory uses on the property to 5% of the total area. With the Commission's proposed modifications, the City of Dallas could be put through a protracted effort to defend its regulations, while the property owner enjoys a benefit unintended by the Commission.

IV. There are better alternatives available.

A. The Commission should consider less drastic, available alternatives. The proposed rule has the potential to exempt satellite dishes from regulations of general applicability. For example, would satellite dishes be allowed in the front yard of residential areas, when no other structure is allowed? The rule should exempt local government regulations that are of general application, and cover only regulations specifically directed at satellite dish antennas.

B. A common objection of both the satellite industry and antenna owners is to requirements that the earth stations be placed in a particular location on the property or be subject to setback

requirements. Rather than enacting a far-reaching rule that would allow satellite antennas to dot the landscape like a steel forest, the Commission should explore a more limited rule that would, for example, require local governments to grant a setback variance when necessary to receive transmissions, assuming that the installation of the satellite antenna was otherwise compliant with local ordinances. We feel that the Commission has not adequately explored these alternatives.

C. Another common objection to local regulations is screening requirements. Again, a narrower preemption or a rule requiring variances is preferable to the proposed comprehensive preemption. The Commission's rulemaking process is flawed without considering this alternative.

D. Finally, an objection has been advanced concerning local regulations which limit the mounting of dishes on poles or towers. Many such regulations were probably established for public safety reasons. Height concerns may be much greater along the coasts and those areas subject to hurricanes and tornados. Obviously, aesthetics are also of concern. While industry may have concerns

over such limitations, the presumption of validity of such regulations should be in the locality's favor.

E. In the recently decided U. S. v. Lopez, 63 U.S.L.W. 4343 (April 26, 1995) ("Lopez"), the Supreme Court limited the power of Congress under the Commerce Clause by holding that Federal actions may not rely on the Commerce Clause to preempt areas of state and local police power unless interstate commerce is "substantially affected". The Supreme Court noted the traditional state and local interest in education. Like education, zoning is a traditionally state and local interest. In light of the holding of Lopez, the proposed rule should show greater deference to local interests. We urge the Commission to consider the implications of the recent Lopez decision in promulgating the final rule.

V. Specific comments about each of the specific provisions.

A. Subsection 25.104(a)

1. In §25.104(a) the terms "substantially limits reception" and "substantial costs" are vague. These terms should be defined in some manner. The term "substantial" in ¶57 of the NPRM would be construed to mean any significant burden. This threshold

is too low, as almost any local government requirement, such as screening, could be characterized as significant.

2. Under subsection 25.104(a) the burden has been placed on the local government to show that the regulation is reasonable and not contrary to federal interests.[11]

a. The proposal to shift the burden of persuasion to the locality is contrary to well settled state law precedent that ordinances are presumed to be valid.

b. Reversing the proposed standard and placing the burden on the property owner will make subsection 25.104(a) consistent with subsection 25.104(e), which provides that the property owner will file a petition for review with the Commission. It is common practice in all litigation and administrative adjudications to place the burden on the complaining party.

c. Shifting the burden to the property owner will decrease the number of cases presented to the Commission. Only those cases that the aggrieved party wishes to actively pursue will be presented to the Commission. Placing the burden on the municipality will encourage property owners to file petitions with

[11] NPRM at ¶ 67

the Commission as a strategy to avoid legitimate ordinance requirements.

d. The proposal is contrary to principles of federalism. Local governments have already gone through a process by which the different competing interests were resolved. The ordinance, not the complaining party, is entitled to deference.

3. In subsection 25.104(a)(1) the phrase "clearly defined and expressly stated" should be removed. Local government regulations enacted prior to this rule may not contain expressly stated legislative findings of the health, safety or aesthetic objective. Further, the phrase suggests that reasonable local government regulations may be preempted solely because the objective is not clearly defined or expressly stated. In addition, rules of local governments across the country which are not directed to satellite antennas but which incidentally cover them, such as setback requirements, will have to be revised to comport with the Commission's rules.

B. Subsection 25.104(b)

1. Subsection 25.104(b)(1) should be revised to read, "in any area zoned for commercial or industrial uses." In urban communities many commercial and industrial uses may be permitted in residential areas as nonconforming uses.

2. Subsection 25.104(b)(1) ignores that satellite antennae in commercial and industrial areas may have a negative impact on adjacent residential, office and retail areas. An exemption should be created for regulations that require a setback or screening from adjacent noncommercial and nonindustrial areas.

C. Subsection 25.104(e)

1. The phrase "potential application" should be deleted from subsection 25.104(e) because it would allow petitions for declaratory rulings by parties who have not been aggrieved by application of a local regulation. Allowing petitions for declaratory judgment is at odds with the goal of reducing the number of petitions the Commission must review.

2. Subsection 25.104(e)(2) should be deleted. Subsection 25.104(e)(2) is impractical because it is unlikely that all administrative procedures will be completed in ninety days. Setting an artificial deadline for completion will increase the number of cases sent to the Commission. In addition, cases will come to the Commission with legal and factual issues undecided by the local government. Rather than attempting to set a period, the rule should rely on the general practice of processing zoning and permit applications as quickly as possible. The rule should not require that

applications for the contemplated use be given special treatment which is a result of the proposal.

3. Subsection 25.104(e)(3) should be deleted. It is rare that an administrative board would condition a permit on a specific expenditure. This subsection, like subsection 25.104(e)(2), will forward cases to the Commission before all factual and legal issues are resolved.

D. Subsection 25.104(f)

1. Rather than providing a blanket standard for waiver, the grounds for waivers should be enumerated. Historic districts are mentioned as an example in ¶68 of the NPRM. Failure to enumerate the grounds will increase the burden on the Commission, because local governments seeking to avoid future challenges will likely submit every ordinance to the Commission for possible waiver.

2. The standard for waivers, ("local concerns of a highly specialized or unusual nature") is too vague to give any guidance to local governments. All ordinances are designed to address local concerns of a highly specialized or unusual nature.

VI. Other Comments

A. 1. Executive Order 12866 of September 30, 1993 ("the Order") directs federal agencies to follow a number of steps as part of any rulemaking. As stated in the Section I:

> "In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits..."

The Local Communities believe that this NPRM constitutes a significant regulatory action within the meaning set forth in the Order. The proposed rules "...adversely affect in a material way ... State, local or tribal governments or communities".

2. The Order, in Section 1(b) entitled *The Principles of Regulation*, outlines a series of steps which an agency is to perform as part of a rulemaking, including cost-benefit analysis and identification of alternatives. The NPRM, in ¶ 15, 16, 19, 20, 21 and 22, references costs imposed by local regulations to satellite dish owners. Little or no